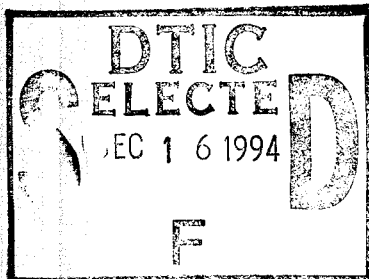


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**Toward a Doctrine of Constraint:
Bridging the Gap Between
Self-Defense and Retaliation**

Bradd C. Hayes



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This memorandum discusses the potentially dangerous tendency of the United States to justify its unilateral military actions using self-defense arguments. The paper argues that a new international doctrine should be adopted which recognizes the use of force to combat such threats to international peace and security as state-sponsored terrorism and rogue nations.

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Bradd C. Hayes

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TOWARD A DOCTRINE OF CONSTRAINT: BRIDGING THE GAP BETWEEN SELF-DEFENSE AND RETALIATION

Bradd C. Hayes

Introduction

There is an old saying that if something looks like a duck, quacks like a duck and waddles like a duck, there's a good chance it is a duck. At least seven times since 1980, the United States has exercised force in a manner fitting much more closely the definition of reprisal than the definition of self-defense; but, in each instance, has justified the operation as an act of self-defense. The reason a duck wasn't called a duck is that reprisal (or retaliation) is generally considered illegal under international law. It's time to call a duck a duck and seek international recognition for a new concept which bridges the gap between self-defense and retaliation. One problem in trying to define a new doctrine is language. Retaliation and reprisal are filled with pejorative meanings, especially for Third World countries (weak states just don't get many good chances to retaliate against strong ones). Therefore, clothing a new doctrine in the right name is important.

More than 60 years ago, Burleigh Cushing Rodick pushed for a concept known as the Doctrine of Necessity.¹ I like the term, but Professor George Walker points out that some of those tried at Nuremberg attempted to escape responsibility for their actions by claiming "military necessity." Thus, the term is tainted. My alternative proposal is to call it the *doctrine of constraint*. Constraint is defined as the "threat or use of force to prevent, restrict, or dictate the action or thought of others."² That's perfect. It even has the right tone to it.

There are good reasons for the Naval Service to support the recognition of such a concept. Since World War II, the Navy has been the service of choice in dealing with over 300 crises around the world - and the number grows every year.³ Some of these crisis responses have fallen into the reprisal category. The 1992 National Military

Strategy specifically states the military must be ready to apply "force such as a preemptory or *retaliatory measure*" in order to "defuse a crisis before it develops into a situation requiring the deployment of large formations."⁴ The Naval Service's White Paper, . . . *From the Sea*, states that "carrier and cruise missile firepower can . . . operate independently to provide quick, *retaliatory strike* capability short of putting forces ashore."⁵ Supporting national policy by exercising force in a possibly illegal manner places naval commanders in ethically, if not legally, compromising situations.⁶ The nation's political leadership shouldn't have to place military commanders in circumstances where they face legal, moral or ethical dilemmas based solely on a sometimes ambiguous canon of international law.

International law, while providing a significant framework for peace and conflict, fails to address any scenario, except self-defense, between outright peace and all out war. The significant rise in international terrorism in the 1980s and the phenomenon of failed states in the 1990s complicated the world's view of peace and conflict. Naval leadership noted, even before the end of the Cold War, that the probable world in which the Navy would find itself operating would be one of "violent peace," the nether region between peace and war.⁷ In order for naval commanders to operate effectively and confidently in a "violent peace" environment, recognized legal doctrines for that environment should be adopted.

The only alternatives to seeking recognition of this new concept are to either blatantly ignore the current tenets of international law or to distort them until they become meaningless. Current US policy tends towards the latter option. Both alternatives are unacceptable. International cooperation demands nations be held to some minimum standard of conduct in order to avoid international anarchy. International law purports to establish that minimum standard. Lacking an effective international enforcement agency, these laws are obeyed primarily out of a sense of moral and practical obligation. Although the United Nations seems to have found new vigor in dealing with international rogues, as an enforcement agency it remains ineffective and must rely on individual states to provide forces when needed. In order to maintain its global leadership position,⁸ the US must be forthright in its adherence to established international law or must, as I will argue, carefully establish new laws which keep pace with changing world conditions.

In order to understand the legal questions involved, a quick primer in international law will be helpful.⁹ For our purposes, there are two

categories into which the uses of force can be placed *self-defense* and *self-help*.

Self-defense

The current legal basis for self-defense is Article 51 of the United Nations Charter which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs."¹⁰ Justifiable self-defense makes an otherwise illegal use of force legal (i.e., force is generally legal only in times of war). But the legality of some forms of self-defense remains ambiguous under current international law.

The modern understanding of self-defense traces its roots to an argument advanced by Daniel Webster while he was serving as Secretary of State. In arguing against Canada's self-defense claim concerning its attack on the American steamship *Caroline* in 1837, Webster stated the "necessity of self-defense [must be] instant [and] overwhelming, leaving no choice of means and no moment for deliberation, and further, the action taken must involve nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it."¹¹ In other words, the threat must be immediate, force must be required to counter it, and the force used must be proportionate to the threat. At the time of the Canadian attack, the *Caroline* was tied up on the US side of the Niagara River. The ship had continually been used to transport supplies to rebels across the river in Canada.¹²

The UN Charter gives the unmistakable impression that self-defense can only be reactive. That is, force may only be used in self-defense *following* an "armed attack." As the United States learned in the 1987 *USS Stark* incident, the military and political (not to mention, the human) costs of absorbing the first blow are generally unacceptable. Numerous legal scholars have argued that the language of the Charter does not necessarily exclude anticipatory (or pre-emptory) self-defense.¹³ The United States unquestionably accepts the legality of anticipatory self-defense as reflected in the National Military Strategy. In testifying before Congress following the Iraqi attack on *USS Stark*, the Secretary of Defense, Caspar Weinberger, declared, "International law recognizes an inherent right to employ proportional force as necessary in self-defense; *this right will be exercised in the face of attack or hostile intent indicating imminent attack*."¹⁴

The long common law tradition of anticipatory self-defense is the main argument used by scholars to justify its acceptance. President Franklin D. Roosevelt established an anticipatory self-defense policy for US naval forces prior to America's entry into World War II. In response to a series of unprovoked submarine attacks on US ships, he declared in a speech on 11 September 1941, "Let us not ask ourselves whether the Americans should begin to defend themselves after the first attack, or the fifth, or the tenth attack, or the twentieth attack. The time for *active defense* is now."¹⁵

The reason I have detailed the argument for anticipatory self-defense is that it forms the logical backdrop and foundation for arguments supporting the doctrine of constraint. Before discussing those arguments, let me complete the primer by providing a brief description of self-help options.

Self-help

Self-help options include *retorsion*, *intervention* and *reprisal*. *Retorsion* consists of legal actions (i.e., actions which are legal in either peacetime or wartime and which do not rely upon the actions of others, like self-defense does, to make them legal) which nonetheless have retaliatory or coercive purposes. For example, in 1818 the US closed its ports to British vessels arriving from British colonies which had closed their ports to US vessels.¹⁶ A retorsive act need not be so dramatic. "Showing the flag" can be a simple but effective form of retorsion. When Ugandan dictator, Idi Amin, forbade Americans to leave his country in February 1977, *USS Enterprise* was sent to a position off the East Coast of Africa. Amin then placed his armed forces on 24-hour alert and stated, "The presence of American naval vessels . . . should be taken seriously." No further US effort was required. Amin rescinded his order and allowed Americans to depart without interference.¹⁷

Reprisals are injurious acts towards an offending state which has breached international law. Reprisals are punitive in nature and seek to compel an offending state to make reparation or avoid further offenses. Reprisals are currently legal only in times of war and, even then, must meet certain criteria. As understood in international law, the following basic requisites must exist in order to make reprisal justifiable:

- The first prerequisite, *sine qua non*, for the right to exercise reprisals is an occasion furnished by a previous act contrary to international law . . .
- Reprisals are only lawful when preceded by an unsatisfied demand. The use of force is only justified by its character of necessity.
- Even if one admitted that international law does not require that reprisals be approximately measured by the offense, one should certainly consider as excessive, and thus illegal, reprisals out of all proportion with the act which motivated them.¹⁸

For us lay persons, that means the target state must have broken international law against the attacking state; the attacking state must have attempted to obtain redress, protection or cessation of illegal acts through peaceful means; and the attacking state must use proportionate force when retaliating.

The final self-help option is intervention. *Intervention* is the dictatorial interference in the domestic or foreign affairs of another state. Intervention impairs the offending state's independence and sovereignty. Intervention is generally considered illegal under current international law. "Between independent states, respect for territorial sovereignty is an essential foundation of international relationships."¹⁹ The 1983 operation in Grenada was openly interventionist. A military spokesman noted, "Military intervention in Grenada brought an end to a violent and chaotic time for this small nation. . . . Military intervention is never easy."²⁰ Nevertheless, the Administration primarily based its public reasoning for the invasion on the self-defense need to protect American citizens in Grenada (but alluded to the fact that the US was invited to participate as part of a treaty obligation). Thus, the invasion was justified using two internationally recognized exceptions to the ban on peacetime use of force. Exceptions to the peacetime use of force have been categorized as follows:

1. acts of self-defense;
2. acts of collective self-defense;
3. actions authorized by a competent international organ;
4. where treaties confer rights to intervene by an *ad hoc* invitation, or where consent is given by the territorial sovereign;
5. actions to terminate trespass;
6. necessity arising from natural catastrophe;

7. measures to protect the lives and property of nationals in foreign territory.²¹

For the remainder of this paper, I will discuss the issues which straddle the gap between self-defense and self-help and develop the doctrine of constraint.

Doctrine of Constraint

Prior to the establishment of the United Nations, "peacetime reprisals were lawful under customary international law. Historically, they were used almost exclusively by strong states against weak ones. . . . However, there is little question that the customary concept of peacetime forcible reprisal is no longer lawful. While not specifically prohibited by the United Nations Charter itself, the Security Council has consistently considered its prohibition a necessary consequence of Articles 2(4) and 51."²² Most often the Security Council's wrath has been directed at Israel who has regularly used reprisals against terrorist bases and targets it deemed military in nature. Between 1968 and 1978, eleven Security Council Resolutions condemned Israel for engaging in illegal reprisals.²³ Occasionally, these resolutions would reference the "punitive" character of the reprisals but most often emphasized their disproportionate character. As one legal scholar noted, "This is scarcely relevant if reprisals are illegal."²⁴ The United Nations specifically required states to refrain from the use of reprisals in its 1970 Declaration of Friendly Relations. Since the US holds veto power, it should be remembered that none of these actions could have taken place without US consent.

Shortly after taking office, President Reagan, supported by Secretary of State George Shultz, indicated he would pursue a new policy dealing with terrorists. As it evolved, the Reagan-Shultz policy provided coherent, justifiable, and badly needed rationale for dealing with an environment of "violent peace." Unfortunately, as discussed below, self-defense remained the public justification for this new policy. The logical outcome of this policy should have been the promotion of a doctrine of constraint which could deal directly with the semi-permanent state of the world between peace and conflict. The Reagan-Shultz policy was first advanced using the language and arguments of reprisal; but because of the illegality of reprisals, the policy had to be justified on the tenuous grounds of self-defense. President Reagan declared in 1981, shortly after the Iranian hostages were released, "Let terrorists be aware that when the rules of international behavior are violated, our policy will be one of swift and

effective *retribution*.”²⁵ Secretary Shultz expanded this theme when he stated, “We must reach a consensus in this country that our responses should go beyond passive defense to consider a means of active prevention, preemption and *retaliation*.”²⁶

Case Studies

Lebanon 1983

In the early 1980s, terrorism against Americans increased dramatically. Identifying those responsible for terrorist acts proved much more difficult than the Reagan Administration thought it would be. Without positive identification, retaliatory raids were impossible. The first real opportunity to implement the new policy of reprisal came in the wake of the tragic suicide bombing of the Beirut headquarters of the US Marine Battalion Landing Team on 23 October 1983. A total of 241 men were killed. “There was no smoking gun, no conclusive evidence that could convict the Iranians in a court of law. . . . But the Reagan Administration knew to a moral, if not a legal, certainty who was responsible for the massacre of the Marines. The plot had been conceived in Tehran, [Iran] born in Baalbek [Lebanon], and wet-nursed at the Iranian Embassy in Damascus [Syria].”²⁷

President Reagan insisted that “those who directed this atrocity must be dealt justice, and they will be.”²⁸ Although the National Security Council pressed for a retaliatory strike, Secretary of Defense Weinberger did not feel there was an appropriate target. Weinberger won the day and strike plans were called off. The French, who lost 59 men to a suicide bomber on the same day the Marines were hit, did mount a retaliatory strike on 17 November but with little effect.

One of the major reasons for US hesitancy was the invasion of Grenada two days after the Marine tragedy. The invasion not only diverted attention from Lebanon, it highlighted military deficiencies among some of America’s most elite forces. “Any thought of a lightning retaliatory raid against those responsible for the Beirut bombing would have to take account of the dismal performance in the Caribbean. A retaliatory raid would require precise intelligence, and the experience in Grenada had not been encouraging.”²⁹

The US continued to fly daily reconnaissance missions over Lebanon searching for signs of an impending attack against the Marines’ airport position. On 3 December, an F-14 reconnaissance aircraft was attacked by an SA-7 surface-to-air missile (SAM). Although the SAM missed, the US now had the target it had been looking for. An immediate attack on the missile site would have been justified under

the rules of self-defense, but the F-14 was unarmed, unaccompanied and returned safely to *USS John F. Kennedy*.

Subsequently, the Joint Chiefs of Staff recommended a strike against Syrian anti-aircraft sites in Lebanon. The strike not only implemented the US's policy of reprisal, it exposed schizophrenic official government concerns about explaining the policy. The Administration did not know whether to call the strike a defensive or retaliatory action. Those who approved the action apparently did not view it as an act of self-defense. General John W. Vessey, Jr., Chairman of the Joint Chiefs of Staff, recalled recommending a strike within 24 hours of the initial SA-7 attack so the United States could tie "the retaliation to the event so we could point to the world and to Syria and say that this was retaliation."³⁰

The Joint Chiefs' *recommendation* to strike within 24 hours had evolved into an operational order by the time it reached the carrier battle force which had to implement it. The unfortunate result was that the strike which had been planned for noon on 4 December was launched at 0730. That meant most of the bombers went off lightly armed and with the wrong ordnance. Instead of forcing ground personnel to look up into the noon sun, the bombers had to fly into the rising sun. The attack turned out to be less than the dramatic signal it was intended to be. Two aircraft were lost, one pilot was killed and a bombardier/navigator was captured. It was an ignoble start for the Reagan-Shultz policy.

President Reagan's official statement concerning the strike was couched in self-defense terms, "We responded to this unprovoked attack by striking back at those sites from whence had come the attack. . . . We are going to *defend* our forces there. And this was the reason, or the purpose of the mission."³¹ Later, Reagan did not object when a newsman referred to the strike as a "retaliatory attack." A Pentagon spokesman declared, "Today's *defensive strikes* are clearly within the stated rules of engagement for our multinational force contingent."³² On the other hand, an Administration official stated, "The *retaliation* was done for military and political reasons."³³

1986 Operation Against Libya

The Administration's policy was again implemented on 14 April 1986 when United States' forces attacked targets in Libya in response to a terrorist bombing in West Berlin that killed two Americans on 5 April. Although the Administration continued to use the language of reprisal to warn both the terrorists and the states supporting them of the consequences of their actions, it felt compelled to use the

language of self-defense when justifying its actions before the United Nations. Secretary Shultz described the Libyan offensive as “an *act of self-defense* . . . proportionate to the sustained, clear, continuing, and widespread use of terror against Americans.”³⁴

As with the Lebanese strike, this attack did not meet any of the customary prerequisites for self-defense. The United States based its actions on evidence linking the West Berlin bombing with Libyan officials and repeated Libyan threats to carry out further terrorist acts. As Shultz stated above, it was a combination of *a past pattern of lawlessness and a presumptive expectation of future legal breaches* upon which the United States based its ‘self-defense’ claim.

This “pattern and expectation of lawlessness” logic used in justifying the Libyan operation was subsequently used on several occasions against Iran.

Operations Against Iran - 4 Cases

From the beginning of the Iran-Iraq War, the United States declared its intention to keep the Persian Gulf open for international shipping, even if it required the use of force. This so-called “Carter Doctrine” was incrementally instituted by the Reagan Administration beginning with the escort of US-flagged tankers. In response to increased tanker attacks by Iran in 1987, reflagged Kuwaiti tankers were given this protection and mining of international waterways was defined as a hostile act (i.e., an act of war) by the United States. By early 1988, “friendly” forces were added to the growing list of those receiving protection from US forces. The list eventually included any neutral shipping which requested assistance.

The Iran Ajr Incident

In the increasingly violent climate of the Gulf, the line between self-defense and reprisal often blurred. The first such obfuscation occurred in September 1987 when the Iranian vessel *Iran Ajr* was caught in the act of laying mines. Although the mines presented no danger to the helicopters witnessing the mining (nor were any surface ships in *immediate* danger), the local task force commander gave the helicopter permission to attack the minelayer in accordance with approved rules of engagement. Twenty-six Iranians were captured and three were killed in the attack. The *Iran Ajr* was seized and, a few days later, blown up.

Although justified by the US as an act of self-defense, the attack did not meet the test of immediacy required by self-defense. Arguably, the attack also exceeded the proportionality test since the ship did

not need to be seized and sunk to alleviate any immediate threat. However, the attack did meet the definition and objectives of reprisal. The Iranians were committing a breach of international law, force was used to stop the breach and punish the perpetrators.

Speedboat Attacks

Two weeks later, an Iranian speedboat fired on a patrolling US helicopter. The helicopter was not hit and turned away from the threat while calling for assistance. The military helicopters which responded attacked all four Iranian speedboats at the scene, sinking three of them and killing at least two Iranians. A Pentagon spokesman declared, "The helicopter crews fired in self-defense."³⁵ Since the helicopter that was attacked had flown out of danger, the subsequent attack was not compelled by an overwhelming necessity of self-defense. More than anything else, this attack was intended as a signal to the Iranians that they could not attack US forces with impunity. Again, the attack straddled the line between self-defense and self-help.

Response to the Attack on the *Sea Isle City*

A week after the helicopter incident, another reprisal was mounted by US forces in response to an Iranian missile attack on a reflagged Kuwaiti tanker, the *Sea Isle City*. Three days after the attack, the United States shelled two offshore Iranian oil platforms in what Secretary Weinberger called "a measured and appropriate response."³⁶ When President Reagan announced the attack, he utilized the logic of reprisal but the justification of self-defense. His official statement declared, "It is a prudent yet restrained response to this unlawful use of force against the United States and to numerous violations of the rights of nonbelligerents. It is a lawful exercise of the right of self-defense enshrined in Article 51 of the United Nations Charter and is being so notified to the president of the United Nations Security Council."³⁷ Clearly, the response failed to meet the criteria for self-defense. It did, however, use the same "pattern and expectation of lawlessness" logic used in the attack against Libya as well as meeting all other tests of reprisal.

Response to *USS Samuel B. Roberts* Hitting a Mine

The final case of reprisal conducted against Iran was mounted in April 1988 after *USS Samuel B. Roberts* struck a recently placed Iranian mine in the Gulf. Four days later, the United States attacked Iranian oil platforms and naval vessels. The inclusion of an Iranian frigate in the attack, along with two oil platforms, was meant to send

a stronger signal of resolve to the Iranian government. During the day of the attack, the fighting exceeded the original limits set by National Command Authority, mainly due to the greater than expected resistance offered by the Iranians. Thus, during the reprisal, legitimate acts of self-defense occurred. Once again the operation was presented in self-defense terms to the United Nations. The United States would have been hard pressed to show a protective rather than punitive purpose for the attacks.

Response to the Attempt to Assassinate Former President Bush

On the eve before former President George Bush was to visit Kuwait in mid-April 1993 (his first visit since the Gulf War), a bomb was confiscated which authorities determined was to be used in an assassination attempt. "CIA analysts traveled to the Middle East to collect pieces of Iraqi bombs that they concluded were made by the same individual as the bomb in Kuwait."³⁸ They also determined that an Iraqi intelligence officer had recruited suspects in the assassination attempt. The investigation led US authorities eventually to link the plot to the Iraqi intelligence agency headed by Saddam Hussein's son. In response, President Clinton launched 23 cruise missiles on 26 June 1993 against the intelligence agency's headquarters in Baghdad. The headquarters was destroyed but two errant missiles hit nearby houses killing several civilians. In explaining his decision for the attack, President Clinton said, "A firm and commensurate response was essential to protect our sovereignty, to send a message to those who engage in state-sponsored terrorism, to deter further violence against our people and to affirm the expectation of civilized behavior among nations."³⁹ No mention was made of self-defense. At last it seemed the United States was going to delineate a new policy concerning reprisal. But the perception was short-lived. Then-Secretary of Defense, Les Aspin, quickly averred, "This crime was committed against the United States and we elected to respond and to exercise our right of self-defense."⁴⁰ Madeleine Albright, US Ambassador to the United Nations followed up by explaining the US had invoked its rights under Article 51 of the UN Charter. Only by contorting any known interpretation of self-defense principles could one reach the conclusion that this operation was something other than retaliation.

Establishing the Doctrine of Constraint

The Reagan-Shultz policy of "proportional responses," especially as used by President Clinton, provides a firm foundation upon which

the doctrine of constraint can be built. But why change the way things are? There are those who argue that the current US interpretation of international law serves our purposes very well. They say there will always be gray areas and further argue that we will never get assent from the international community for this concept. Such arguments raise a dilemma. If the US continues to adopt this policy unilaterally, US global leadership could be undermined (i.e., how do you maintain moral leadership and simultaneously ignore international law?). Unilateral acceptance by the US also opens the door for others to put similar, but less constrained, policies into practice (like the Israelis have done) resulting in serious international implications. After all, there is a long history of UN renunciation of peacetime reprisals. A special committee study prepared for the American Bar Association's Section of International Law and Practice reported:

[T]here has been a steady erosion of the legal norms governing the use of force in international relations . . . and . . . this erosion has left national leaders feeling less constrained by these norms than they once were. This, we think, is a dangerous trend. History has shown that the successful use of the military instrument has a tendency to become habit forming, with the right to use armed force inferred by the victor from the fact of victory.⁴¹

In other words, without a generally accepted doctrine of constraint, exactly the opposite of what the Reagan-Shultz policy of reprisal was intended to accomplish could occur (that is, more – not less – violence). A tightly defined doctrine of constraint will both reestablish international norms and set limits on the use of force that will hopefully break the trend noted above. If such a notion is not adopted, nations, including the United States, will continue to act unilaterally on the edges of the law. As one scholar noted, "Given the dismal fact of contemporary history that international law has largely failed to develop comprehensive standards to deal with terrorism or to take any meaningful action to counter the global terrorist threat, states will be faced increasingly with the necessity to use self-help measures and act unilaterally against the threat of terrorism."⁴²

That means naval commanders will continue to face crises which involve them in peacetime reprisals – and they will do so without the benefit of legal justification. The danger of continuing an incremental increase in the peacetime use of force is obvious. The chorus of people who wanted the Yugoslav and Somali crises to be resolved by force – and resolved as quickly as the Iraq-Kuwait crisis – provide ample evidence. To stem the danger of this creeping escalation of violence, as well as to provide legal justification for

dealing with terrorism, a clearly defined doctrine of constraint should be established by the United States and promoted in international organizations such as the United Nations, NATO and World Court.

As has been discussed, there are substantial differences between the recognized justifications for self-defense and those suggested for constraint operations. The latter have at least two distinct differences compared to self-defense acts: 1/ There is no overwhelming and compelling need to act immediately; and 2/ they have both a protective and punitive purpose. Exactly who or what is in need of protection is often loosely defined because, in most instances, constraint operations are meant to preclude future breaches of international law. Thus, the doctrine of constraint can properly be defined as an active defensive measure which could be accepted under a broad interpretation of Article 51 of the UN Charter. Nevertheless, since reprisals have historically been used by powerful states against weaker ones, obtaining formal United Nations General Assembly approval is problematic if not hopeless. At a minimum, therefore, the United States should clearly state its policy, calling it by name, detailing the circumstances and limitations surrounding its applicability, and state that the US expects other nations to adhere to the same standards it has established for itself.

By establishing the doctrine of constraint as an international concept, nations will have a much clearer standard by which their actions can be judged. For military commanders, legalization of constraint operations will remove ethical, moral or intellectual dilemmas which might be faced in planning and executing retaliatory operations. I have stressed the term *doctrine of constraint* because I believe that it more accurately reflects the extremely limited scenarios in which it is applicable. The justification for constraint operations can only be found in the "pattern and expectation of lawlessness" logic used by the United States during operations against Libya and Iran. The following tests must therefore be satisfied:

- a past pattern of lawlessness must be established;
- peaceful means of redress must have been unsuccessful;
- evidence indicating the likelihood of future breaches of international law must be shown;
- the reprisal must be reasonably proportionate to the *anticipated* wrong (customary reprisal requires force proportionate to the *initial* wrong).
- the reprisal must be against legitimate military (or terrorist) targets;

- reprisal attacks against civilians in any form are strictly forbidden.

The desired objectives of the doctrine of constraint remain essentially the same as for traditional reprisal. Many people believe that reprisal merely encompasses the concept of "an eye for an eye" but that is simply not true. Traditional "retaliatory acts are designed: (1) to enforce obedience to international law by discouraging further illegal conduct; (2) to compel a change in policy by the delinquent state; and (3) to force a settlement of a dispute with the delinquent states whose actions breached international law."⁴³ These remain legitimate goals of constraint operations. The differences between traditional reprisal and the doctrine of constraint arise primarily between the severity or proportionality of the methods used to accomplish these objectives. Arguably, none of the reprisals conducted by the United States since 1980 have (or could have) actually enforced, compelled, or forced anything by themselves. They were deliberately limited in their nature and were meant to signal resolve more than to coerce compliance. They inherently embraced the threat of greater violence should limited suasion fail (i.e., they included the threat of traditional reprisal). The Gulf War demonstrated the difficulties of "enforcing obedience" to international law. Even after absorbing a terrible pounding by coalition forces, Iraq resisted UN measures at every turn. Therefore, when defining the objectives of the doctrine of constraint, less bellicose language is more appropriate. Instead of "enforcing obedience," constraint operations would "encourage observance." Instead of "compelling change," constraint operations would "provide an impetus for change." Instead of "forcing a settlement," constraint operations would "promote a settlement."

If the tenets of the doctrine of constraint are not recognized, the line between self-defense and aggression will continue to blur. The idea of proportionality is already beginning to erode. Spurred by the growing public expectation of quick, low-casualty, televised warfare, the concept of "decisive force" is creeping into discussions and planning even for military actions intended to signal resolve rather than defeat an adversary. Recent military success has also fostered an unhealthy impatience for giving instruments of policy, other than the military, time to work. One scholar insists, "If the United States accepted proportionate reprisals as an acceptable, legitimate form of self-help, it would be unnecessary to stretch the meaning of self-defense, especially by alluding to some future, ill-defined, potential

acts of terrorism which may prove exceedingly difficult to link to state support."⁴⁴ He's right and doing so would make retaliation too easy. That is exactly why I believe it *is* important to have a "pattern and expectation of lawlessness" linkage to justify constraint operations. It shouldn't be easy.

Legal Considerations

Following the attack on Libya in 1986, forty individuals who were wounded during the attack, along with the estates of fifteen deceased victims, brought suit against the United States and other defendants in federal district court in Washington, DC. Among the defendants were Ronald Reagan, Caspar Weinberger and various generals and admirals. The suit alleged that the defendants had committed war crimes which resulted in the deaths and injuries to the plaintiffs.⁴⁵ Although the suit was dismissed by both the federal district court and the Court of Appeals for the District of Columbia, a study of these decisions should offer scant comfort to military commanders.

The case was dismissed on the grounds that the defendants had sovereign immunity under the Federal Tort Claims Act.⁴⁶ However, only a strained interpretation of the Act allowed the courts to reach that conclusion. "The Act contains sovereign immunity exceptions for acts of the United States officials that involve the exercise of discretion, that arise from combatant activities in time of war, and that arise in a foreign country. 28 U.S.C. @ 2680(a), (j) and (k). Arguably, the claimed negligence negates the discretion exception, the fact that the United States was not at war with Libya negates the wartime exception, and the fact that the decisions were made in the United States and that only their operative effect occurred abroad negates the foreign-country exception."⁴⁷

Dismissal of the case may have had as much to do with politics as it did with law. Counsel for the plaintiffs were Ramsey Clark and Lawrence W. Schilling. Clark's liberal politics have enraged more than one conservative and his penchant for getting headlines is well known. On the other side of the circuit court bench sat Judges James Buckley, Douglas Ginsburg and David Sentelle, all Reagan appointees, and Reagan was being accused of war crimes. Buckley, in particular, is politically about as far right as Clark is far left. Not only did Judge Buckley and his colleagues dismiss the suit, they imposed sanctions against Clark and Schilling for initiating a frivolous lawsuit.

By turning the political tables, a very different outcome is not too difficult to imagine. Judges sympathetic to Clark's liberal leanings

could have allowed the points of law to be argued on their merit. The possibility of liberal judiciary is not out of the question. After all, President Johnson thought Ramsey Clark sufficiently knowledgeable to appoint him Attorney General. Where would a successful lawsuit have left military commanders subsequently asked to carry out retaliatory strikes?

Were the district and circuit courts correct? Did the case honestly offer "no hope whatsoever of success"? As the bulk of this paper has demonstrated, domestic law is only a piece of puzzle and not the most important piece. The purpose of the Clark lawsuit was to demonstrate that war crimes had been committed since "traditional tort doctrine allows for the recovery of damages for harm inflicted in violation of criminal law."⁴⁸ More important questions concern whether or not those engaging in retaliatory acts can be charged with crimes under existing international law.

Ramsey Clark's assertion that such acts constitute war crimes is certainly arguable. "Under Article 6(a) of the Charter of the International Military Tribunal at Nuremberg, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 3 Bevans 1238, 82 UNTS 279, the term 'war crime' is defined to include 'murder'; Article 6(c) defines the term 'crime against humanity' to include 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population.'"⁴⁹ These are certainly not the first civilian casualties incurred during military operations that have not been viewed as war crimes. For example, the Libya bombing in no way compares to RAF Bomber Command's policy of area bombing during World War II. While that policy remains controversial (morally, ethically and strategically), neither its primary proponent, Air Chief Marshal Sir Arthur "Bomber" Harris, nor the airmen who implemented area bombing were seriously considered war criminals.⁵⁰

Nevertheless, the Nuremberg trials did underscore that military commanders have few, if any, defenses for carrying out illegal acts. Certainly the defense of sovereign immunity is not available under international law. Neither the Nuremberg trials nor the Far East trials could have proceeded had such a defense been available. The principle of holding military commanders responsible for implementing illegal orders has a long history in United States law. In 1804, the Supreme Court held "that a captain of a U.S. warship acting under the President's orders could be held personally liable in trespass for seizing a neutral vessel on the high seas. Chief Justice Marshall, for a unanimous court, held that the commander of a ship of war, in

obeying instructions from the President of the United States, acts at his peril."⁵¹

The point of this lengthy discussion is that reprisal and retaliation have a legitimate place in an increasingly violent world but that the current canon of law fails to recognize it. This predicament unnecessarily leaves military commanders in an awkward and compromising position. Steps should be taken to correct the situation.

Conclusion

Since naval forces continue to be the tip of the sword in crisis response, pushing for clarification of legitimate uses of force in scenarios short of war is in the Navy's and Marine Corps' best interests. Men and women of arms should not have to hide behind legal facades if their actions serve legitimate and ethical purposes. The public demands and deserves people of integrity serving and protecting them. It cannot reasonably be argued that skirting the law instills confidence in either the public or the military. Yet, skirting the law is exactly what happens when policymakers resort to semantical arguments in the international arena in order to justify military operations. Justifiable and reasonable military actions should stand on their own merits as well as on firm legal ground. The case studies show that the US has established the foundation for a new custom. That custom should now be placed under a new title and its limits carefully defined. It is not only time to call a duck a duck, it is time to get our ducks in a row. As Shakespeare wrote, "O, it is excellent to have a giant's strength; but it is tyrannous to use it like a giant."⁵²

Endnotes

1. Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (1928).
2. *Webster's II New Riverside University Dictionary* (Boston: The Riverside Publishing Co., 1988), p. 303.
3. Barry Blechman and Stephan Kaplan, *Force Without War: U.S. Armed Forces as a Political Instrument* (Washington, D.C.: Brookings Institution, 1978); and Adam B. Siegel, *The Use of Naval Forces in the Post-War Era: U.S. Navy and U.S. Marine Corps Crisis Response Activity, 1946-1990* (Alexandria: Center for Naval Analyses, 1991).
4. Colin L. Powell, *National Military Strategy, 1992* (Washington, D.C., 1992), p. 16 (emphasis added).
5. Sean O'Keefe, et. al., . . . *From the Sea: Preparing the Naval Service for the 21st Century* (Department of the Navy, September 1992), p. 9 (emphasis added).
6. Legal liability is not just an international concern but a domestic one, as well. As discussed later in the paper, both the Federal Tort Claims Act and the Foreign Claims Act contain sections pertinent to the Services carrying out retaliatory strikes.
7. James D. Watkins, "The Maritime Strategy," *USNI Proceedings*, Special Supplement, January 1986, p. 8.
8. Past US policy has placed a premium on America's ability to bring moral suasion, as well as military might, to the international arena. Moral suasion is most at risk if the US is viewed as operating outside international law.
9. As a non-lawyer, I freely admit not knowing all the subtleties of the law.
10. W. Thomas Mallison, "Aggression or Self-Defense in Lebanon in 1982?" *American Society of International Law Proceedings*, Volume 77, 1983, p. 176.
11. Bruce Harlow, "The Legal Use of Force - Short of War," *USNI Proceedings*, Volume 92, Number 11, November 1966, p. 94.
12. Gregory F. Intoccia, "American Bombing of Libya: An International Legal Analysis," *Case Western Reserve Journal of International Law*, Volume 19, Spring 1987, p. 201.
13. Mallison, op. cit.; J. Ashley Roach, "Rules of Engagement," *Naval War College Review*, Volume 36, Number 1, January-February 1983; J.A. McCredie, "The April 14, 1986, Bombing of Libya: Act of Self-Defense or Reprisal?" *Case Western Reserve Journal of International Law*, Volume 19, Spring 1987, pp. 215-242; Christopher Greenwood, "International Law and the United States' Air Operation Against Libya," *West Virginia Law Review*, Volume 89, Summer 1987, pp. 933-960; Guy B. Roberts, "Self-Help In Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals," *Case Western Reserve Journal of International Law*, Volume 19, Spring 1987, pp. 243-293; Intoccia, op. cit.; R.J. Zedalis, "Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense," *Case Western Reserve Journal of International Law*, Volume 19, Spring 1987, pp. 129-175. For an opposing view, see Istvan Pogany, "Nuclear Weapons and Self-Defense in International Law," *Connecticut Journal of International Law*, Fall 1986, pp. 97-119.
14. Caspar Weinberger, *A Report to Congress on Security Arrangements in the Persian Gulf*, 15 June 1987, p. iii (emphasis added).
15. Harlow, op. cit., p. 94 (emphasis added).
16. *Ibid.*, p. 92.
17. Michael T. Kaufman, "Amin Prohibits Exit by 200 Americans; Bids Them Meet Him," *The New York Times*, 28 February 1977, p. A1; and "Uganda Invites U.S. to Send Observers for Amin's Meeting," *The New York Times*, 28 February 1977, p. A1. Author was on board Enterprise at the time.
18. Roberts, op. cit., pp. 279-280.
19. D.W. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), p. 14. There is a school of thought which believes that

intervention for humanitarian purposes may not only be legal but morally essential. See Harlow, op. cit., p. 93. See also Thomas G. Weiss, "On the Brink of a New Era? Humanitarian Interventions, 1991-94"; Dorinda Dallmeyer, "National Perspectives on International Intervention"; and Stephen John Stedman, "UN Intervention in Civil Wars: Imperatives of Choice and Strategy," in Donald C.F. Daniel and Bradd C. Hayes, eds., *Beyond Traditional Peacekeeping* (London: The Macmillan Press Ltd., 1995).

20. Colonel Richard L. Fuller, "The American Victory in Grenada," *St. Louis Post-Dispatch*, 23 November 1988.

21. McCredie, op. cit., p. 228 (paraphrase of I. Brownlie, *International Law and the Use of Force by States* (1963), pp. 432-433).

22. Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law*, thesis dissertation, The National Law Center, George Washington University, 20 September 1986, pp. 26 & 39. Article 2(4) states, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

23. Ibid., p. 41.

24. D.W. Bowett, "Reprisals Involving Recourse to Armed Force," *66 American Journal of International Law*, 1, 3.

25. Richard Halloran, "Swift U.S. Retribution for Terrorists Called Doubtful," *The New York Times*, 3 February 1981, p. B13 (emphasis added).

26. Roberts, op. cit., p. 248 (emphasis added).

27. David C. Martin & John Walcott, *Best Laid Plans: The Inside Story of America's War Against Terrorism* (New York: Harper & Row, 1988), p. 133.

28. Ibid., p. 134.

29. Ibid., p. 134.

30. Ibid., p. 141.

31. "Transcript of the President's News Session," *The New York Times*, 5 December 1983, p. A10 (emphasis added).

32. Thomas L. Friedman, "Bombers Hit Lebanon, Syrians Down 2," *The New York Times*, 5 December 1983, p. A10 (emphasis added).

33. Steven R. Weisman, "The U.S. Denies Beirut Attacks Are Meant to Broaden Role," *The New York Times*, 5 December 1983, p. A10 (emphasis added).

34. Roberts, op. cit., p. 287 (emphasis added).

35. John H. Cushman, Jr., "U.S. Says Copters Answering Shots," *The New York Times*, 9 October 1987, p. A1.

36. Caspar Weinberger, "Weinberger Statement on U.S. Attack in Gulf," *The New York Times*, 20 October 1987, p. A11.

37. "Text of Reagan Statement," *International Herald Tribune*, 20 October 1987, p. 7.

38. R. Jeffrey Smith, "Iraqi Officer Recruited Suspects In Plot Against Bush, U.S. Says," *Washington Post*, 1 July 1993, p. 18.

39. Samuel Francis, "Defense lesson," *Washington Times*, 2 July 1993, p. F-1.

40. Ibid.

41. Roberts, op. cit., p. 246.

42. Ibid., p. 246.

43. Ibid., p. 281.

44. Roberts, op. cit., p. 288.

45. *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988) and *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989).

46. 28 U.S.C. @ 1346(b) (1982). The plaintiffs also invoked the Foreign Claims Act, 10 U.S.C. @ 2734. The Act's regulations require the services to "pay claims arising from accident or malfunction of aircraft operations, including airborne ordnance, occurring while preparing for, going to, or returning from a combat mission." 32 C.F.R. @ 842.64(m). See Anthony D'Amato, "The Imposition of Attorney Sanctions for Claims

Arising From the U.S. Air Raid on Libya," *The American Journal International Law*, Volume 84, July 1990, p. 706, n. 3.

47. Ibid.

48. Ibid., n. 11.

49. Ibid., n. 10.

50. The fact that winners aren't tried for war crimes is one of the "spoils of war" that encourages unethical military behavior.

51. Ibid., p. 709.

52. William Shakespeare, *Measure for Measure*, Act ii, Scene 2.

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